FOR ARGUMENT

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 78-1604**

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

**On Appeal from the Supreme Court of Arizona**

## APPELLANT'S REPLY BRIEF

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## CONTENTS


| | PAGE |
|---|---|
| ARGUMENT | 1 |
| A. The Label Arizona Attaches to Its Tax Is Immaterial. | 1 |
| B. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Were Not Raised Below and Are Barred by Collateral Estoppel. | 2 |
| C. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Are without Merit. | 3 |
| 1. *Warren* has not been eclipsed by Supremacy Clause decisions in other areas of law. | 3 |
| 2. *Warren* is consistent with *McClanahan*. | 5 |
| 3. The *Warren* construction of the Buck Act is correct. | 5 |
| *a. The Buck Act did not intend to authorize state taxation of commerce with reservation Indians.* | 6 |
| *b. The Buck Act does not apply to Indian reservations.* | 11 |
| 4. The Buck Act does not validate state privilege taxes. | 14 |
| CONCLUSION | 15 |

## AUTHORITIES


CASES — PAGE

*Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) .. 2

*Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918) ..... 5

*Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) ..... 3

*Bryan* v. *Itasca County*, 426 U.S. 373 (1976) ..... 5, 9, 10, 13, 14

*Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977) ..... 1, 2

*Ex parte Crow Dog*, 109 U.S. 556 (1883) ..... 10

*DeCanas* v. *Bica*, 424 U.S. 351 (1976) ..... 3

*Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977) ..... 4

*Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963) ..... 3, 4

*Hines* v. *Davidowitz*, 312 U.S. 52 (1941) ..... 4

*Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) .... 4

*Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) ..... 12

*The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) ... 4

*Kennerly* v. *District Court*, 400 U.S. 423 (1971) .... 5

*McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973) ..... 4, 5

*Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711 (1835) 12

*Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) ..... 11, 13





*Montana* v. *United States*, 440 U.S. 147 (1979) ..... 2

*Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118 (1906) ..... 6

*Morton* v. *Mancari*, 417 U.S. 535 (1974) ..... 10

*Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976) ..... 11

*Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) ..... 12

*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). 3

*Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956) ..... 4

*Ray* v. *Atlantic Richfield Co.* 435 U.S. 151 (1978) .. 3

*Rice* v. *Olson*, 324 U.S. 786 (1945) ..... 4

*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) ..... 3, 4

*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) ..... 5, 10

*Silas Mason Co.* v. *State Tax Comm'n*, 302 U.S. 186 (1937) ..... 6

*Thomas* v. *Gay*, 169 U.S. 264 (1898) ..... 6

*United States* v. *Celestine*, 215 U.S. 278 (1909) ..... 11

*United States* v. *John*, 437 U.S. 634 (1978) ..... 4

*United States* v. *Kagama*, 118 U.S. 375 (1886) ..... 4

*United States* v. *Mazurie*, 419 U.S. 544 (1975) ..... 4, 5

*United States* v. *Ramsey*, 271 U.S. 467 (1926) ..... 12

*United States* v. *Sandoval*, 231 U.S. 28 (1913) ..... 12

*United States* v. *Thomas*, 151 U.S. 577 (1894) ..... 11

*United States* v. *Wheeler,* 435 U.S. 313 (1978) ..... 5

*United States* v. *Winans,* 198 U.S. 371 (1905) ..... 5

*Utah & N.R. Co.* v. *Fisher,* 116 U.S. 28 (1885) ..... 6

*Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685 (1965) ..... 6, 8

*Washington* v. *Fishing Vessel Ass'n,* _____ U.S. _____, 61 L.Ed.2d 823 (1979) ..... 4

*Washington* v. *Yakima Indian Nation,* 439 U.S. 463 (1979) ..... 12

*White Mountain Apache Tribe* v. *Bracker,* No. 78-1177 ..... 11

*Williams* v. *Lee,* 358 U.S. 217 (1959) ..... 5

*Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832) ... 4

TEXTBOOKS

F. Cohen, *Handbook of Federal Indian Law* (U.S. Dept. of Interior 1942) ..... 4, 12

L. Tribe, *American Constitutional Law* (Foundation 1978) ..... 4

CONSTITUTIONS, STATUTES

U.S. Const., art. I, § 8, cl. 3 ..... 2

4 U.S.C. 104 ..... 11

4 U.S.C. 105-106 ..... 14

4 U.S.C. 105-110 ..... 5

4 U.S.C. 109 ..... 8, 9, 13

4 U.S.C. 110(e) ..... 11

25 U.S.C. 177 ..... 12



OTHER

S.Rep.No. 1625, 76th Cong., 3d Sess. (1940) .... 8, 9, 11

Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. (1940) ..... 7, 8, 9, 13

84 Cong. Rec. 6737 (1939) ..... 6

84 Cong. Rec. 10685-86, 10907 (1939) ..... 7

86 Cong. Rec. 7012 (1940) ..... 9, 13

57 I.D. 129 (1940) ..... 11

58 I.D. 562 (1943) ..... 10, 11

Federal and State Indian Reservations and Indian Trust Areas (U.S. Dept. of Commerce 1974) ..... 8

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v.

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## APPELLANT'S REPLY BRIEF

## ARGUMENT

### A. The Label Arizona Attaches to Its Tax Is Immaterial.

Arizona begins its brief with an extensive discussion of the label to be affixed to its tax, contending that it is a "privilege" tax rather than a "sales" tax. We have discussed this question in our opening brief (at 15-16) but will add one point. The Court has repeatedly held that the title given a tax is not determinative of its validity. *E.g., Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977). Rather, one looks to its actual terms of imposition. The Arizona tax in question is measured by sales, a fact independent of the name the State chooses to call it.

Historically, state "privilege" taxes applied to interstate commerce were *per se* invalid under the Commerce

Clause. *See Complete Auto Transit* v. *Brady, supra.* Thus if independent significance is to be restored to the label "privilege tax," Arizona's tax is invalid under the Commerce Clause as a tax on the privilege of trading with the Indian tribes. U.S. Const. art. I, § 8, cl. 3.

### B. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Were Not Raised Below and Are Barred by Collateral Estoppel.

Arizona devotes the largest part of its brief to arguments that the *Warren* decision has been implicitly overruled or eclipsed by subsequent decisions of this Court. Ariz.Br. 12-29. The State first contends that *Warren* misinterpreted "general principles of federal preemption." Ariz.Br. 12-14. It is then contended that the Court's decision in *McClanahan* v. *Arizona Tax Comm'n,* 411 U.S. 164 (1973), "has modified the rational" of *Warren.* Ariz.Br. 23. These arguments should be rejected, because they were not made below and because Arizona is precluded by collateral estoppel from asserting them.

1. The argument that *Warren* has been overruled or eclipsed by subsequent decisions of this Court was never raised below nor considered by the courts below. In the words of Arizona's brief, it is "a brand new issue." Ariz.Br. 30. This Court has frequently held that it "will not ordinarily consider" such issues. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970) and cases cited.

2. Arizona was a party to *Warren,* and the issues it seeks to raise now were actually litigated in that case. *See* jurisdictional statement and briefs in *Warren,* No. 115, Oct. Term, 1964. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States,* 440 U.S. 147, 153 (1979). Although Central Machinery Co. was not a party to *Warren,* a nonparty to the prior case can properly invoke collateral estoppel so long as the party against whom estoppel is asserted had a full and fair opportunity to be heard. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979); *Blonder-Tongue Laboratories* v. *University of Illinois Foundation,* 402 U.S. 313 (1971). The question expressly and definitely presented in this action is the same as that definitely and actually litigated and adjudged adversely to the State in *Warren.* This question cannot be relitigated now.



### C. Arizona's Arguments That *Warren* Has Been Implicitly Overruled Are without Merit.

#### 1. *Warren* has not been eclipsed by Supremacy Clause decisions in other areas of law.

Arizona argues that the Court in *Warren* cited *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), and that *Rice* has been eclipsed or implicitly overruled by the decisions in *DeCanas* v. *Bica,* 424 U.S. 351 (1976) and *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). Ariz.Br. 12-14. It seems unlikely that this was the intent of the Justices who joined in the majority opinions in these cases, because both opinions cited approvingly to *Rice.* 424 U.S. at 357; 373 U.S. at 146.[1]

*Rice* aside, Arizona's argument is based on a faulty premise about Supremacy Clause jurisprudence. This Court's interpretations of the purposes of Congress in Supremacy Clause cases have been strongly influenced by the subject matter of the case under review. In *Florida Lime,* the Court emphasized that, "[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of State superin-

[1] *Rice* has since been favorably cited in a number of decisions, *e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

tendence." 373 U.S. at 144. In other words, in Supremacy Clause cases an important factor is whether the subject matter is traditionally federal, traditionally state, or the case involves a clash of both. *See Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 272 (1977); *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

In recent years the federal government has more often entered areas traditionally left to the States than *vice versa,* and the Court has required a rather specific intent of Congress to preempt state law in such areas, as was the case in *Florida Lime, supra.* Where the area in question is traditionally federal, the Court has generally attributed broader scope to the congressional undertaking. *E.g., Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956) (sedition); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941) (aliens). *See* L. Tribe, *American Constitutional Law* 385-86 (Foundation 1978).

The government of Indian country and trade with Indians and tribes therein have long been areas of federal domination and of tribal independence under federal supervision. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *McClanahan* v. *Arizona Tax Comm'n, supra,* 411 U.S. at 168, quoting *Rice* v. *Olson,* 324 U.S. 786, 789 (1945). *See also United States* v. *Kagama,* 118 U.S. 375, 384 (1886); *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 757 (1867); *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832); F. Cohen, *Handbook of Federal Indian Law* 116 (U.S. Dept. of Interior 1942).

For these reasons the Court has accorded a broad reach to the scope of federal Indian statutes and treaties in Supremacy Clause cases. *See Washington* v. *Fishing Vessel Ass'n,* _____ U.S. _____, 61 L.Ed.2d 823 (1979); *United States* v. *John,* 437 U.S. 634 (1978); *United States*



v. *Mazurie,* 419 U.S. 544 (1975); *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Williams* v. *Lee,* 358 U.S. 217 (1959).[2] The Court's decision in *Warren* was soundly based on these traditions. There is nothing in the Court's recent decisions from other legal fields to support the abrupt change in course asserted by Arizona here.

### 2. *Warren* is consistent with *McClanahan.*

Arizona argues that *Warren* was implicitly overruled or eclipsed by the Court's decision in *McClanahan* v. *Arizona Tax Comm'n, supra.* Ariz.Br. 14-29. The notion that *Warren* is inconsistent with *McClanahan* is again an unlikely intent of the Justices who joined in the Court's later opinion, since *Warren* was cited favorably four times, and specific reliance was placed on it. 411 U.S. at 170, 175, 177, 180.[3]

Arizona relies on the *McClanahan* opinion's discussion of the Buck Act, 4 U.S.C. 105-110. But *Warren* was favorably cited in that part of the opinion. 411 U.S. at 177.

### 3. The *Warren* construction of the Buck Act is correct.

*McClanahan* aside, the argument that the *Warren* Court misinterpreted the Buck Act has no merit. In the

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[2] Related judicial rules of construction have supported broad construction of federal Indian statutes and treaties. Consensual agreements are to be interpreted as the Indians understood them. United States v. Winans, 198 U.S. 371, 380 (1905). Indian statutes are to be liberally construed and doubts resolved in favor of the Indians. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). The Court does not imply a purpose of Congress to diminish tribal self-government absent a clear showing that Congress so intended. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Court applied these rules to deny state taxing authority under an uncertain statute in Bryan v. Itasca County, 426 U.S. 373 (1976).

[3] *Warren* has been favorably cited a number of times since, *e.g.,* United States v. Wheeler, 435 U.S. 313, 324 (1978).

*Warren* litigation, Arizona argued for the same construction of the Buck Act as it asserts here, relying on both its language and legislative history. *Warren*, No. 115, Oct. Term, 1964, Brief for the Appellee 16-19. This Court rejected the argument on two alternative grounds: (1) the Buck Act was not intended to apply to Indian reservations; (2) even assuming it was, "nothing whatever in that Act suggests to us that Congress meant to give States new power to tax reservation Indian traders." 380 U.S. 685, 691 n. 18.[4]

These grounds are actually very similar. By 1940 it was well settled that non-Indians in Indian country were subject to state and territorial taxes in matters not affecting Indians.[5] Thus to construe the Act as inapplicable to Indian reservations or as not affecting preexisting Indian tax immunities is practically the same thing.

### *a. The Buck Act did not intend to authorize state taxation of commerce with reservation Indians.*

The legislative history of the Buck Act shows that Congress meant to leave state taxation on Indian reservations as it was before the Act—neither to take from the Indians any immunity or measure of tribal self-government, nor to grant any new immunities to non-Indian commerce. The original bill which led to the Act made no reference to Indians. H.R. 6687, 76th Cong., 1st Sess., introduced June 6, 1939. 84 Cong. Rec. 6737. There is no indication

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[4] Both grounds had been briefed by appellant Warren Trading Post Co., *Warren,* No. 115, Oct. Term, 1964, Appellant's Reply Brief *passim.*

[5] *See* Silas Mason Co. v. State Tax Comm'n, 302 U.S. 186, 209 (1937); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906); Thomas v. Gay, 169 U.S. 264 (1898); Utah & N.R. Co. v. Fisher, 116 U.S. 28 (1885).



that commerce with Indians had any connection with the bill's purposes.

It is true that the bill's possible relation to Indian reservations was discussed in Congress. The Interior Department raised the issue out of concern that the proposed bill might be construed by state authorities to infringe on Indian rights, and a specific exemption for Indian reservations was then proposed. 84 Cong. Rec. 10685-86, 10907 (1939).

At a Senate subcommittee hearing the following year, Congressman Dempsey of New Mexico testified expressing his concern that a specific exception for Indian reservations might by negative implication create immunity for non-Indian businesses from all state taxes, and Arizona relies heavily on his view. Ariz.Br. 19-20. But Arizona's brief quotes the Congressman selectively. In the same statement as that quoted by the State, he also said:

> We have no objection whatsoever to prohibiting the sales taxes applying to Indians, but we cannot conceive of any reason why a man should move a store onto an Indian reservation to avoid or stop collection by the State of a tax when the goods are sold not to Indians but to tourists and people living in the vicinity of the reservation

Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. 19 (1940). This Congressman advocated continuing the exemption of commerce with Indians but making sure that commerce between non-Indians on Indian reservations was taxed. *Id.* at 20.[6]

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[6] Arizona also quotes a statement by Congressman Buck referring to the City of Palm Springs, California, and asks the Court to find by judicial notice that the Congressman was referring to an Indian reservation. Ariz.Br. 18-19. We agree that a portion of the Agua Caliente Indian Reservation is within Palm Springs. We don't know whether

The published legislative history does not directly explain the addition to the bill of what is now 4 U.S.C. 109.[7] But there are clues in the Hearing Report and Congressional Record. As discussed above, Rep. Dempsey of New Mexico advocated that sales to Indians remain nontaxable but that sales to non-Indians be taxed.[8] Later an Assistant Solicitor from the Interior Department reminded the Senators of the longstanding rule that commerce within Indian country but not involving Indians is subject to state and territorial taxes. Hearing, *supra*, at 38; *see* note 5 *supra*. He said the Department applied this rule to non-Indian licensed traders selling to non-Indian customers. Hearing, *supra*, at 38. On this basis he asked the Senate Subcommittee to leave state taxation on Indian reservations as it was before the Act. *Id.*

In *Warren*, the Court held that Interior got what it wanted. 380 U.S. at 691 n. 18. As shown above, this is consistent with the position of Rep. Dempsey of New Mexico, and Arizona says his view is reflected in the statute. Ariz.Br. 19-20. Further support is found in the description of the final bill to the full Senate by Senator George, Chairman of the Subcommittee which added 4 U.S.C. 109. He said:

> [The bill] merely permits the States to collect a sales tax on sales that are made within a reservation which lies within the extraterritorial jurisdiction of the State. *It is not intended to confer any power upon the State,* but simply to relieve the situation that now prevents collection. [Emphasis added.]

86 Cong. Rec. 7012 (May 28, 1940).

That Interior was satisfied that the final statute achieved its aim to protect existing Indian immunities is inferable from other facts of record. At the close of the April 1940 hearing, the Senate Subcommittee (Senators George, Brown and LaFollette) suggested to Rep. Buck that a conference be arranged with the Interior, Navy and War Departments to work out needed amendments. Hearing, *supra*, at 40; *see also* S.Rep. No. 1625, 76th Cong., 3d Sess. 1 (1940). The amendment which became 4 U.S.C. 109 was drafted at that time. The record does not indicate definitely whether such a conference occurred and generated the amendment, but Interior did not thereafter oppose the bill. It is reasonable to infer that the Department viewed the amended bill as consistent with its objective.

A number of rules of construction also support the Court's conclusion in *Warren*. The special rules concerning federal Indian laws and treaties have already been mentioned. Note 2 *supra*. In *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), the Court interpreted a seemingly broad but ambiguous grant to the States of civil jurisdiction over Indian country not to abolish any Indian tax immunities. The Court said:

> "[S]tatutes passed for the benefit of dependent Indian tribes. . .are to be liberally construed, doubtful

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Congressman Buck was referring to it, but even if he were his statement is consistent with the Court's interpretation of the Buck Act in *Warren*. A 1974 report listed the Indian population on or near the reservation as 74 persons. Federal and State Indian Reservations and Indian Trust Areas 78 (U.S. Dept. of Commerce 1974). By 1940 Palm Springs was already a sizeable city with a large tourist trade. Common sense indicates that Congressman Buck was concerned about sales to non-Indians, not to the very small (and in 1940 still impoverished) Indian population.

[7] 4 U.S.C. 109 was added by the Senate Subcommittee following the April 1940 hearing cited above. The only committee report on the amended bill was S. Rep. No. 1625, 76th Cong., 3d Sess. (May 16, 1940). It merely restated without explanation the terms of the proposed amendment which became 4 U.S.C. 109. No House committee report was made on the amended bill.

[8] A premise of the Hearing discussion of Indian reservations was that the existing sellers were non-Indians, although Rep. Dempsey did say that sales by Indians to others would be exempt. Hearing, *supra*, at 19.

> expressions being resolved in favor of the Indians." [Citations omitted.] This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. [Citations omitted.] "This is so because. . .Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity . . ." [citation omitted].

426 U.S. at 392. Thus the rights derived from the Indian trading laws and the statute setting aside the Gila River Reservation should not be limited by the uncertain terms of the Buck Act.

In addition, the Court has often held that repeals by implication are not favored, and that where possible a subsequent statute should be reconciled to a prior one. This rule was applied to sustain preexisting Indian rights in *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) and in *Ex parte Crow Dog*, 109 U.S. 556, 570 (1883). *See also Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In the instant case, Arizona asks the Court to reverse *Warren* and hold that the Buck Act limited preexisting Indian rights under the Indian trading laws and infringed on the economic and tribal self-government purposes of the Gila River Reservation. Such repeals should not be found absent a clear and convincing showing that Congress intended them, and Arizona has failed to make such a showing.

Finally, the *Warren* construction has also been the consistent interpretation of the the statute by the Interior Department. Three years after the Act was passed, the Department concluded: "Basic Indian immunities under the law in force prior to the enactment were not disturbed nor were new immunities created." 58 I.D. 562, 563 (1943). The settled interpretation by the agency administering Indian affairs—including commerce with Indians and



tribes—is entitled to "great respect." *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976).[9]

### *b. The Buck Act does not apply to Indian reservations.*

The Buck Act authorizes States to impose sales, use and income taxes in "federal areas." Federal areas are defined in 4 U.S.C. 110(e) as "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States. . . ." This language may fit federal agency lands within Indian reservations, such as for Bureau of Indian Affairs and Indian Health Service facilities. But it requires more than a little stretching to make the statute include the rest of an Indian reservation or other Indian country.

Arizona contends that reservations are lands "held . . .by. . .the United States," albeit in trust for the tribes. Ariz.Br. 24-25. But land ownership in Indian country includes tribal land, individual Indian allotments, and unrestricted land owned by Indians, non-Indians, corporations, States, and the federal government. *See, e.g., Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976); *United States* v. *Celestine*, 215 U.S. 278, 286 (1909); *United States* v. *Thomas*, 151 U.S. 577 (1894). Individual allotments are both "trust" allotments, with

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[9] Arizona's brief in this case attempts to adopt by reference its argument in the tandem case (White Mountain Apache Tribe v. Bracker, No. 78-1177) concerning the Hayden-Cartwright Act, 4 U.S.C. 104. Ariz.Br. 18 n.15. However, that Act presents distinct questions. Its places of application are different from the Buck Act's definition of federal areas. Early Interior Department interpretations of the two statutes differed. Contrast 57 I.D. 129 (1940) with 58 I.D. 562 (1943). 4 U.S.C. 104 has a distinct legislative history. Even when it was amended at the time the Buck Act was passed, no attempt was made to reconcile the disparate statutory terms. *See* S.Rep. No. 1625, 76th Cong., 3d Sess. 4-5 (1940). Appellant here takes no position on the issues concerning 4 U.S.C. 104 in No. 78-1177.

fee title in the United States in trust for an Indian, and "restricted" allotments, where the Indian owns the fee subject to a restriction against alienation in the United States. *See United States* v. *Ramsey*, 271 U.S. 467, 470 (1926).

Nor does tribal land readily fit the statutory definition. It is usually set aside by a treaty, statute, or executive order, often (as at Gila River) confirming the aboriginal ownership of the tribes. There is normally no deed showing ownership of the fee, beneficial ownership, reversions, and the like.[10] Rather, these relationships are fixed by federal statutes and by principles drawn from international law. *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). All tribes are restricted from conveying their lands, regardless of the formal title. *Id.*; 25 U.S.C. 177. The United States has the sole right of preemption upon extinguishment of the Indians' title. *Johnson* v. *M'Intosh, supra*, 8 Wheat. at 592. But the tribal title "is as sacred as the fee simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835). The United States' residual right is sometimes equated with the fee title held by a common law trustee. *E.g., Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979). But the actual state of tribal title is based on principles unique to federal Indian law, which are analogous to the common law only in certain respects. *See* F. Cohen, *Handbook of Federal Indian Law, supra,* at ch. 15.

Thus, the Buck Act definition of federal areas at best fits only portions of Indian reservations, and this Court has eschewed "checkerboard" applications of Indian jurisdictional laws. *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* 425 U.S. at 478. To include all of Indian country within the Buck Act definition requires substantial bending or distortion of the terms. Arizona, therefore, must show clear congressional intent to have the Act apply. This is especially so because of the rule that Indian rights will not be infringed by ambiguous laws or doubtful constructions of them. *Bryan* v. *Itasca County, supra,* discussed at pages 9-10.

[10] Even when there is, the ownership may formally be in a tribe in fee simple, but statutory restrictions make the title practically the same as other tribal lands. *See* United States v. Sandoval, 231 U.S. 28, 48 (1913).



The legislative history does not support Arizona's contention. As already discussed, there was concern expressed by some western congressmen that non-Indian commerce in Indian country should be subject to state taxes. Page 7, *supra*. But thereafter the Interior Department pointed out to the Senators that existing law allowed such taxes and advocated retention of existing Indian country rules. The Department may have assisted in drafting the amended bill and in any case did not oppose it. Pages 8-9, *supra*. It is therefore possible that the Senate Subcommittee accepted Interior's position, and 4 U.S.C. 109 was added out of an abundance of caution to protect Indian immunities and because the definition of federal areas might include portions of Indian reservations, such as federal agency lands.

A further source of doubt about inclusion of Indian country arises from the frequent equation of "federal areas" with places under exclusive federal territorial jurisdiction, in statements by Rep. Buck and others. Hearing, *supra*, at 3, 4, 5, 17, 32, 39. Senator George, whose Subcommittee redrafted the bill to its final form, told the full Senate that the bill applied to reservations which lie "within the extra territorial jurisdiction of the State." 86 Cong. Rec. 7012 (1940), quoted more fully at page 9, *supra*. As the Interior Department had told the Senators, Indian reservations are not such places. Hearing, *supra,* at 38.

One cannot resolve the question definitely on the meager record left by the 76th Congress. This uncertainty is far short of the clear congressional purpose needed to authorize state taxation of commerce with reservation Indians. *Bryan* v. *Itasca County, supra.* Therefore the Court's conclusion in *Warren* that the Buck Act does not apply to Indian reservations is correct.

**4. The Buck Act does not validate state privilege taxes.**

Arizona strenuously contends that its tax is (and always has been) a privilege tax and not a sales tax. Ariz.Br. 3-7. But the Buck Act only authorizes imposition of state sales, use and income taxes. 4 U.S.C. 105-106. The statute nowhere authorizes a privilege tax. Thus by the terms of Arizona's own argument, the Buck Act has no application to the tax at issue.



## CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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